

**IN THE HIGH COURT OF TANZANIA**  
**(IN THE DISTRICT REGISTRY)**  
**AT MWANZA**

**PROBATE APPEAL NO. 10 OF 2020**

*(Arising from Nyamagana District Court in Probate Appeal No. 4 of 2020,  
Originating from the Mkuyuni Primary Court in Probate and Administration Cause No.  
33 of 2019)*

**SIKUJUA MODEL MWASONI ..... APPELLANT**

**VERSUS**

**SIKUDHANI HANSI MWAKYOMA ..... RESPONDENT**

**J U D G M E N T**

*Date of last Order: 22.10.2020*

*Date of Judgment: 12.11.2020*

**A.Z.MGEYEKWA, J**

This is a second appeal. Stems from the Primary Court of Mkuyuni in Probate and Administration Cause No. 33 of 2019. The appellant appealed against the Judgment of the District Court of Nyamagana in Probate Appeal No. 04 of 2020. The matter arises from Mkuyuni Primary Court in Probate and Administration Cause No. 33/2019.

The background to this appeal is briefly as follows: Sikudhani Hansi, respondent applied for the letters of administration of the Estate of the late Perfecto Lyapa vide Probate Case No. 33 of 2019, before the Mkuyuni Primary Court and was duly appointed. Thereafter, one Sikujua Modei Mwason, appellant file an objection complaining that she is the wife of the late Paulo Perfecto Lyapa. The respondent lamented that the appellant applied for a letter of administration in her personal capacity while the appointed administrator one Teresia Lyapa was an appropriate person to apply for a letter of the administrator of the estate of Paulo Perfecto.

Sikujua, the appellant urged the Primary Court to quash the appointment of Sikudhani, the respondent as an administrator of the estate in Probate Case No.33 of 2019. Sikujua also urged the Primary Court to invoke his power and quash its decision in Probate Case No.33 of 2019 and allow his son Alex to receive a share.

In determining the instant dispute the trial court found that there were two clan meetings which were held to appoint an administrator of the estate of the late Paul Perfecto Lyapa. It was also found that Sikudhani did not involve clan members in the said meeting while Sikujua (the objector) involved clan members. For the interest of justice, the Mkuyuni



Primary Court decided to revoke Sikudhani appointment and ordered the clan members to appoint an administrator of the estate who is not a family member thus, court broker Silasi Lucas Isangi was appointed to be an administrator of the estate of the late Paul Perfecto Lyaba.

Aggrieved, Sikudhani, the appellant lodged an appeal before the District Court for Nyamagana claiming among other things that the Primary Court had no jurisdiction to determine the matter. The first appellate court allowed the appeal on the ground that the trial court had no jurisdiction to determine the probate matter.

Dissatisfied, Sikujua, the appellant filed an appeal before this court and filed a petition of appeal containing two grounds of appeal as follows:-

1. *That the Magistrate erred in law and facts for failure to consider the material facts that the mode of life of the deceased is not determiner on how the deceased was buried hence misdirected himself by holding that Mkuyuni Primary Court had no jurisdiction to determine the matter.*
2. *That the trial Magistrate erred in law and fact when he reached the decision by not taking into consideration the appellant's evidence in the record.*

When the matter was coming for hearing the appellant enjoyed the legal service of Ms. Hidayah Haruna, learned counsel while the respondent enjoyed the legal service of Mr. Chiwalo Samwel, learned counsel assisted by Ms. Pricila and Mr. Yuda, learned counsels.

It was Ms. Hidayah who started to kick the ball rolling. She opted to consolidate the grounds of appeal. She stated that the Probate Appeal originates from Probate Cause No. 33 of 2019. Ms. Hidayah argued that the trial magistrate misdirected himself by nullifying the trial court proceedings based on the fact that the court had no jurisdiction to determine the Probate Cause No.33 of 2019. She went on to argue that the trial court reached such a decision after concluding that the deceased lived a Christianity life thus the trial court had no jurisdiction to determine the case.

Ms. Hidayah went on to state that the Primary Court has jurisdiction over all civil matters where a law applicable is customary and Islamic law while probate under Christianity matter is administered under the Probate and Administration of Estate Act, and Indian Succession Act. She added that section 8 of the Probate and Administration of Estate Act requires that in application for administration of the estate is to be done under his custom unless there is a WILL which shows that his



administration be done in Islamic or Christianity. She added that the one who petition must testify and prove if the deceased was a Moslem or a Christian.

The learned counsel for the appellant further states that in the trial court there was no evidence to prove that the deceased was a Christian. She added that without knowing the mode of life of the deceased then it is not correct to rule out that the Primary Court had no jurisdiction to determine the matter. Insisting, she stated that what matter matters was the mode of life of the deceased and not how he was buried. The learned counsel for the appellant stated that the deceased had a customary marriage since he had two wives, he was practicing customary beliefs and not a Christianity lifestyle.

Ms. Hidayat did not end there, she stated that the marriage ceremony is one of the factors to determine the mode of life of the deceased. Ms. Hidayat faulted the first appellate court for deciding a new issue because at the trial court proceedings there is nowhere stated that the deceased was brought to church for his last service.

On the strength of the above, Ms. Hidayat beckoned this court to allow the appeal with costs since the mode of life of the deceased was not determined.

Responding, Mr. Chiwalo argued that the appeal is baseless. He argued that the Primary Court has jurisdiction to determine customary and Islamic matters thus it had jurisdiction to try the probate case. On his view, he argued that the Primary Court had no jurisdiction since the in accordance with the records the deceased was buried as per Christianity procedure. He added that it is not normal for a pagan to be buried or to go to the church to convene a burial ceremony. He insisted that a person who was brought to church means his lifestyle was Christianity.

On her side, Ms. Pricila, the learned counsel argued that the appellant was required to tender exhibit to prove that the deceased's mode of life. She insisted that section 19 (1) (c) of the Magistrate Court Act, 5<sup>th</sup> Schedule Rule 2 of the Primary Court is not relevant if the Probate and Administration of Estate Act is applicable.

Mr. Chiwalo contended further that there was no evidence on record to show that the deceased's mode of life was customary and Islamic. He stated that the first appellate court had rightly decided that the matter should start afresh to allow parties to adduce evidence and find out whether the deceased was a Christian or Moslem.



Mr. Chiwalo objected that the deceased had two wives. He valiantly argued that the appellant was not a deceased wife. He added that the deceased had only one wife who is the respondent. He went on to argue that even if he had two wives, he might have changed his beliefs or religion to Christianity thus it is not correct to conclude that he was non-religious. To support his argumentation on jurisdiction Mr. Chiwalo cited the cases of **Hadija Said Matika v Awesa Said Matika** PC Civil Appeal No.02 of 2016 High Court and **Christian Alexander Ntonge v Limi Mbogo**, PC Civil Appeal No.11 of 2017. Mr. Yuda argued that the District Court nullified the objection and the trial court proceedings for lack of jurisdiction. He insisted that the respondent initiated the proceedings in a wrong forum.

In conclusion, Mr. Yuda urged this court to uphold the appellate court decision and dismiss the appeal with costs.

Submitting on the second ground of appeal, Ms. Pricila argued that the trial court proceedings had a lot of contradiction since there were a lot of allegations thus the court was required to determine as to whose evidence is heavier must win the case. Mr. Yuda added that the lifestyle and law applicable was important to be determined in order to know how to divide the deceased properties. In her rejoinder, Ms.

Hidaya maintained her submission in chief and insisted that the first appellate court was wrong to determine the deceased's mode of life by basing on burial ceremony. She added that both of them were deceased wives.

In conclusion, she urged this court to allow the appeal and the matter to proceed in dividing the deceased properties.

Having heard the submissions of learned counsel for the appellant and learned counsels for the respondents, I am now set to confront the grounds of contention as enumerated above, I have found that the grounds of appeal are intertwined and therefore I will determine them together.

With regard to the issue of jurisdiction, it is clear that when it comes to the issue of probate, the Primary Court has jurisdiction over all civil matters where the law applicable is customary and Islamic law and the court determines probate matters if parties had a customary marriage or Islamic marriage. In case parties had a Christian marriage the matter is instituted in the District Court.



In the records, it shows that the respondent is the one who instituted the matter at Mkuyuni Primary Court. The records reveal that the respondent did not state the nature of their marriage whether it was Christianity or Islamic or customary marriage. When the objector filed an objection; the appellant lamented that she was the wife of Paul Perfecto Lyaba (the deceased). However, none of them tendered an exhibit to prove the existence of marriage and none of them testified or narrated the mode life of the deceased. The records are silent whether the deceased's last ceremony was conducted in the church, whether the deceased had a polygamy marriage or whether the deceased had a customary marriage then he left one wife and converted into Christianity.

None of the above-mentioned issues was featured in the trial court record and even during the objection proceeding. I am in accord with the learned counsel for the appellant the issue of mode of life of the deceased was raised as a new issue at the first appellate court. Hence the trial court did not deal with it. It is trite law that the appellate court is not required to determine a new issue, a new ground cannot be raised by submission at the appellate level. In the case of **Hassan**

**Bundala Swaga v Republic**, Criminal Appeal No. 385 of 2015

(unreported) it was held that: -

*"It is now settled that as a matter of general principle this Court will only look into the matters which came up in the lower courts and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."*

From the above excerpt, the Court of Appeal of Tanzania restates the position that a second appellate court cannot adjudicate on a matter which was neither raised as a ground of appeal nor deliberated and determined in the lower court. In my view, the first appellate court erred in determining a new issue, and the same lead the District Court to arrive at a wrong conclusion. I am saying so because it was not known whether the deceased was living a Christianity life or customary life. The issue raised requires both parties to prove the mode of life of the deceased. Therefore it was not right to rule out that the Primary Court entertained the case while there was no evidence that the deceased was a Christian.

With the above findings, I find that I am not obliged to discuss other matters raised by the learned counsels since both parties



submitted in length the mode life of the deceased. The respondent counsels tried to prove that the deceased had a Christianity mode of life in order to justify that the trial court had no jurisdiction to determine the matter. On the other hand, the appellant's counsel testified to prove that the deceased was living a customary life. While the said issue was raised at the first appellate court.

In the upshot, I quash and set aside the proceedings, decision and order of Nyamagana District Court in Probate Appeal No. 4 of 2020 and Mkuyuni Primary Court in Probate and Administration Cause No. 33 of 2019. I hereby revise the Mkuyuni Primary Court decision in Probate and Administration Cause No. 33 of 2019. I proceed to direct the Primary Court record be remitted back for it to hear the parties afresh on the issue of mode life of the deceased in order to determine the issue of jurisdiction. Appeal allowed without costs.

Order accordingly.

DATED at MWANZA this 12<sup>th</sup> November, 2020.

  
A.Z.MGEYEKWA

**JUDGE**

12.11.2020

Judgment delivered on 12<sup>th</sup> November, 2020 in the presence of Ms. Prisila Pancras, learned counsel for the respondent also holding brief for Ms. Hidaya, learned counsel for the appellant.



  
A.Z.MGEYEKWA

**JUDGE**

12.11.2020